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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VICTOR D'ARC,

Petitioner,

vs.

MARY LEA J. D'ARC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a trial court's application of the "preferred suitor" doctrine, which doctrine mandates the adoption of a special standard favoring the wife instead of treating each party equally when considering the enforceability of an interspousal separation agreement entered into between the parties freely, voluntarily and understandingly deny the husband his right to equal protection of law as guaranteed by the 14th Amendment to the United States Constitution? Does the trial court's action in refusing to enforce such an agreement which is not unfair or unconscionable on its face violate article 1, §10 of the United States Constitution which prohibits the adoption of any law impairing the obligation of a contract.

2. In a matrimonial proceeding does the action of a trial judge in divesting one party of all his right, title and interest in any and all property acquired by him prior to the marriage as well as all property acquired by both parties or either of them during the marriage based on an allegation of marital misconduct unrelated to the acquisition of said assets or the manner in which title was held constitute a taking of property without due process of law as prohibited by the 14th Amendment to the United States Constitution?

3. In a civil proceeding does the allowance into evidence of a purported tape recording of an alleged telephone conversation where there is absolutely no direct testimony or other proper foundation established concerning the circumstances surrounding the making of the tape, the control of the tape and the delivery of the tape to the party who sought its introduction violate the provisions of 18 *U.S.C.A.* §2510-2520?

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OPINIONS BELOW

The opinions below are as follows:

D'Arc v. D'Arc, 157 N.J. Super. 553 (Ch. 1978).

Letter Opinion of the Superior Court of New Jersey, Chancery Division by the Honorable Michael R. Imbriani dated March 14, 1978, which is set forth in the accompanying appendix (Pa3a).

Letter Opinion of the Superior Court of New Jersey, Chancery Division by the Honorable Michael R. Imbriani dated November 20, 1978, which is set forth in the accompanying appendix (Pa16a).

D'Arc v. D'Arc, 164 N.J. Super. 226 (Ch. 1978).

D'Arc v. D'Arc, 175 N.J. Super. 598 (App. Div. 1980) (Pa34a).

Order denying plaintiff's application for certification to the New Jersey Supreme Court dated December 9, 1980, which is set forth in the accompanying appendix (Pa43a).

JURISDICTION

Certiorari to this court is sought pursuant to 28 *U.S. C.A.* §1257(3) (Pa28b).

STATUTES

The statutes involved in this case are set forth below as follows:

N.J.S.A. 2A:34-23

2A:34-23. Alimony; maintenance; custody and maintenance of children; failure to obey order; sequestration; receiver; modification of orders

Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require.

In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to

either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just. In all actions for divorce or divorce from bed and board where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State as well as the ability of the plaintiff to pay in determining an amount of maintenance to be awarded.

In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.
Amended by L.1971, c.212, §8.

All other statutes, constitutional provisions and Rules are set forth verbatim in the accompanying appendix. The following is a list thereof:

14th Amendment to the United States Constitution (Pa3b).

U.S.C.A. Const. Art. 1 §10 (Pa27b).

N.J.S.A. Constitution Art. 4, §7, ¶3 (Pa4b).

18 *U.S.C.A.* §2510-2520 (Pa4b).

28 *U.S.C.A.* §1257 (Pa28b).

N.J.S.A. 2A:156A-1 through 26 (Pa28b).

New Jersey Evidence Rule 8 (Pa48b).

GROUNDS FOR JURISDICTION

(a) The agreement

Certiorari is sought to review the decision of the Superior Court of New Jersey, Chancery Division dated November 20, 1978, 164 N.J. Super. 226 (ch. 1978), the decision of the Superior Court of New Jersey, Appellate Division dated October 10, 1980 175 N.J. Super. 598 (App. Div. 1980) and the December 9, 1980 order of the New Jersey Supreme Court denying plaintiff's application for certification thereto.

In particular it is submitted that the question as to whether a State Court has the right to apply the "preferred suitor" doctrine which specifically favors the wife as the preferred spouse when viewing the enforceability of an interspousal agreement is a question of far reaching public importance which should be considered by this court. Interspousal separation and property settlement agreements as well as premarital agreements are entered into by millions of people each year who rely on their enforceability. The significance of this question is underscored by contemporary notions of equality between sexes, expanding woman's rights and the proposed "Equal Rights Amendment." Moreover the mobility of our society wherein people move from one State to another further emphasizes the need for this court to consider this now timely and novel issue.

It is submitted that the court's adoption of a "preferred suitor" doctrine which, in fact, favors the wife as opposed to treating each party equally, is a denial of a husband's constitutionally guaranteed right of equal protection, and an improper exercise in sex discrimination. Furthermore it is an adoption of a standard which is in conflict with the

now public policy of treating husbands and wives equally under the law in matrimonial cases, as well as the principles of equality established by this court in *Orr v. Orr*, 440 U.S. 268 (1979).

Finally it is submitted that the refusal of the trial court to enforce the agreement between the parties after adopting this doctrine constitutes an unconstitutional impairment of the parties' contractual obligations.

The issue as to the enforceability of the February 22, 1976 agreement between the parties was raised in the second cause of action in plaintiff's initial complaint wherein judgment was sought.

> "(A) Specifically enforcing the agreement entered into between the parties dated February 22, 1976."

The trial judge (line 17, page 11 of the letter opinion dated November 20, 1978) set forth his findings with respect to the February 22, 1976 agreement, recited the adoption of the "preferred suitor" doctrine and proceeded to deny plaintiff-husband's application for enforcement of the agreement. Thereafter in Point II of plaintiff's main brief on appeal it was argued that adoption of the "preferred suitor" doctrine was inappropriate and its application by the trial judge constituted ". . . a violation of the equal protection clause (fourteenth amendment) of the U.S. Constitution as well as the laws of New Jersey (16 Am. Jur. 2nd 514). In that same point it was further argued that:

> "The Federal Constitution and the State Constitution prohibit the adoption of any law impairing the obligation of a contract. U.S. Constitution, Article 1 Section 10: *Daniel v. Borough of Oakland*, 24 N.J. Super. 69 (App. Div. 1973)."

The Appellate Division inferentially affirmed the trial court by ignoring this issue and the New Jersey Supreme Court denied certification.

(b) Equitable distribution and related financial matters including alimony.

In the first cause of action of plaintiff's complaint for divorce filed September 30, 1976 judgment (in part) was sought:

° ° °

"(B) Compelling the defendant to pay adequate alimony for the plaintiff;

(C) Providing for an equitable distribution of assets of the parties legally and beneficially acquired during the course of the marriage."

° ° °

In the trial memorandum (plaintiff's summation, Points I and II) it was argued that the issue of the alleged marital misconduct, *i.e.* the alleged telephone conversation which took place after the parties separation was not a relevant or proper factor to be considered by the trial judge *vis a vis* the issues of support and property distribution. Reliance was upon *N.J.S.A.* 2A:34-23 and the New Jersey Supreme Court's rulings in the cases of *Painter v. Painter*, 65 N.J. 196 (1974); *Rothman v. Rothman*, 65 N.J. 290 (1974); *Scalingi v. Scalingi*, 65 N.J. 180 (1974) and *Chalmers v. Chalmers*, 65 N.J. 186 (1974). After hearing "certain testimony" *(infra)* on this issue, the trial judge in this letter opinion stated that:

"Candidly, the court believes that Dr. D'Arc (plaintiff) is entitled to nothing, . . ."

The trial judge "permitted" plaintiff to retain the proceeds from the sale of the apartment which he owned prior to the marriage as well as certain other assets. Each party appealed and plaintiff argued in Point IV of the main brief that the court's determination was in fact a deprivation of property without due process of law and violative of the decisions of the State's highest court. The Appellate Division, affirmed the trial court in part, agreeing with the trial judge that plaintiff was entitled to nothing and further directed plaintiff to pay the proceeds from the sale of his apartment as well as other assets to defendant. The Appellate Division did not set forth the authority for directing plaintiff to convey the proceeds from the sale of this property (his apartment) owned by him prior to the marriage nor was there authority for the Appellate Division's affirmance of the order which required plaintiff to forfeit his interest *in any and all property* acquired by the parties during the marriage. The Appellate Division did not comment on the fact that the decisions of the New Jersey Supreme Court make it clear that fault is not a factor to be properly considered insofar as property distribution is concerned.

The New Jersey Supreme Court denied plaintiff's application for certification. As a result this case stands alone as being in conflict with the decisions of New Jersey's highest court and plaintiff's due process argument has been ignored.

(c) The tape.

The issue as to the admissibility of the purported tape recording was raised in plaintiff's trial summation (page 19), and was the subject of an interlocutory appeal along with the issue of the admissibility of spectrographic results *D'Arc v. D'Arc*, 157 N.J. Super. 553 (Ch. 1978). Therein

it was argued that admissibility of the purported tape recording was prohibited by 18 *U.S.C.A.*, §2510 *et seq.* and *N.J.S.A.* 2A:156A-1 *et seq.* It was also argued that plaintiff had been denied his constitutional right to cross examine the individuals who allegedly made the tape, had control of the tape and delivered the tape to defendant (page 27 and 28). Notwithstanding these arguments the trial judge admitted the purported tape recording into evidence over the objection of plaintiff relying on New Jersey Evidence Rule 8(1).

It was again argued in Point I of plaintiff's main brief on appeal that the purported tape of the alleged telephone conversation should not have been admitted into evidence. Reliance is on 18 *U.S.C.A.* §2511 and §2515 (and *N.J.S.A.*, 2A:156A-1 through 4 to the same effect). It was again argued that plaintiff had been denied his constitutionally protected right to cross examine the individuals who allegedly made the tape, controlled it and delivered it to defendant.

The Appellate Division (page 4 of the letter opinion dated October 10, 1980) ruled that plaintiff's argument and reliance on 18 *U.S.C.A.*, §2511 was "without merit." The Appellate Division decision went on to state:

> "The testimony of defendant at trial showed that one of the parties to the conversation, Theodore Fino, told her he made the tape. Though defendant's testimony was hearsay it nevertheless could be considered in the preliminary proceeding under evidence Rule 8 to determine admissibility of the tape, particularly since defendant could rightly regard Fino as not available. *State v. Moore*, 158 N.J. Super. 6880-84 (App. Div. 1978). In any event there is no showing of illegal wiretapping, only speculation by plaintiff."

That is the sum and substance of the Appellate Division consideration of this issue.

This argument was advanced in Point II of plaintiff's application for certification to the New Jersey Supreme Court which application was denied.

STATEMENT OF THE CASE

This is a matrimonial action wherein the parties were married on July 15, 1972, after having lived together for approximately one year. Both parties were in their early fiftys at the time of the marriage and it was the second marriage for each. The parties separated on or about February 22, 1976 at which time they entered into a written separation agreement. They complied with the provisions of that agreement for several months thereafter with payments being made and accepted pursuant thereto. Defendant in approximately April, 1976, ceased making the payments that she was obligated to make under the agreement. On September 30, 1976 plaintiff filed a complaint for divorce which, in the second cause of action sought enforcement of the separation agreement between the parties. During the course of the trial it was established that the agreement was entered into freely and voluntarily by both parties. The trial judge, however, denied plaintiff's application to enforce the agreement. In so doing the trial judge applied the so called "preferred suitor" doctrine which doctrine specifically requires the adoption of a standard that affirmatively favors the wife rather than to treat each spouse equally.

The trial judge was thereupon required to effect an "equitable distribution" of property acquired by the parties during the marriage under the relatively new (effective September 1, 1971) equitable distribution statute in New Jersey, *N.J.S.A.* 2A:34-23. The assets acquired by the parties during the marriage were extensive and consisted of real property owned for the most part as tenants by the entirety as well as bank stock, art objects and other assets. The assets were worth several million dollars. The trial judge, presumably pursuant to the authority vested in him

by that statute, ruled that plaintiff was to convey all his right, title and interest in any and all of these assets to defendant. Plaintiff was "permitted" to retain the proceeds from the sale of an apartment in New York City (in the approximate amount of $150,000.00) which apartment was owned solely by plaintiff having been acquired by him prior to the marriage.

Plaintiff appealed and defendant cross-appealed whereupon the Appellate Division not only affirmed the trial court's order but further ruled that plaintiff was to turn over to defendant the proceeds from the sale of his N.Y. apartment and other assets. Plaintiff's request for alimony was also denied. Plaintiff literally was required to forfeit any and all assets acquired by him both prior to and subsequent to the marriage having been directed to turn over all said assets to defendant. This ruling was essentially based on an alleged act of marital misconduct instead of being related to the method (time, contribution or manner in which title was held) by which the assets were acquired.

The pivotal fact in this case which led to the extraordinary result was each party's allegation that the other party spoke to a third person about the possibility of having the other killed. Defendant attempted to prove her claim by the introduction into evidence of what purported to be a tape recording of an alleged telephone conversation between plaintiff and a third person. This tape recording was allowed into evidence without the existence of any direct testimony or evidence concerning the circumstances surrounding the making of the tape, the control of the tape or the delivery of the tape to defendant. In short, there was no direct testimony to establish a proper foundation necessary for the admission of the tape into evidence.

REASONS FOR THE ALLOWANCE OF THE WRIT

Point I

The trial court was in error in applying the "preferred suitor" doctrine when considering the enforceability of an interspousal separation agreement entered into freely and voluntarily by both parties and fair on its face. The error constitutes a denial of the right to equal protection as provided by the 14th Amendment of the United States Constitution and further constitutes an impairment of contractual obligations as prohibited by article 1 §10 of the United States Constitution.

In the within case the parties at the time of their separation on February 22, 1976 entered into a separation agreement. The agreement was formalized in writing and submitted into evidence during the hearing as exhibit D-1 (Pa61a). The parties testified that the provisions of the agreement had been negotiated at some length between them and that they discussed and agreed to each and every provision of the agreement before it was prepared. Only then was the agreement actually formalized in writing at which time it was executed by both parties. The proofs adduced at trial established that plaintiff did not apply any pressure on defendant to sign the agreement nor did he threaten her in any manner. Defendant had sufficient time to read the agreement, she admittingly understood it and for several months the parties performed in accordance with its provisions.

The trial court, however, ruled that the agreement was not enforceable. In so ruling the trial judge cited several cases to support his application of the "preferred

suitor" doctrine which requires the trial court to adopt a position specifically favoring the wife in such cases. It is respectfully submitted that this is in error for several reasons: (1) the application of this doctrine in any case is an unconstitutional denial of equal protection to the husband; (2) is an unconstitutional impairment of contractual obligations; (3) is unjustifiable sex discrimination; and (4) the facts of this case do not warrant the application of the doctrine.

Defendant-wife had candidly admitted that she signed the agreement freely and voluntarily after reading it and the trial judge found absolutely no evidence of fraud, coersion, undue influence or improper conduct by plaintiff with respect to the agreement. It was established that the parties entered into the agreement freely and voluntarily. Each party had been previously divorced and each was experienced with respect to business ventures and contracts with defendant having entered into many substantial business ventures and transactions with and without the benefit of attorneys. Thus, it is submitted that the trial judge was in error in applying the preferred suitor status in favor of the wife rather than in applying a standard of equality.

The established law of the State of New Jersey is that contracts between husband and wife are enforceable in equity so long as they are fair and equitable. The application of the preferred suitor doctrine which favors the wife in such matters is a denial of equal protection and contrary to the public policy clearly expressed by the New Jersey Supreme Court in *Lepis v. Lepis*, 83 N.J. 139 (1980), *Brandenburg v. Brandenburg*, 83 N.J. 198 (1980), *Carlsen v. Carlsen*, 72 N.J. 363 (1977), and by this court in *Orr, supra.*

The guarantee of equal protection as provided by the fourteenth amendment of the United States Constitution (and *N.J.S.A.* 2A:34-23) mandates that husbands and wives are to be treated equally in matrimonial actions including proceedings involving the enforcement of interspousal agreements.

The agreement in question itself provides as follows:

> "Mary Lea (defendant-wife) acknowledges this to be a fair and just arrangement in recognition of the fact that Victor (plaintiff-husband) gave up his professional career and earnings to be able to devote himself to her business interests and that he contributed all of his energies to their marriage and family affairs.
>
> "If Victor and Mary Lea should become divorced they agree that this agreement shall be part of the divorce decree.
>
> "Victor agrees that if in his lifetime he should acquire sufficient capital in his personal estate to produce the same amount of income, Mary Lea will be released from all financial obligations to him."

At the time that the agreement was entered into by the parties each of them was fully aware of the other's income, assets and needs. Defendant has an income of $1,200,000.00 per year *plus* (in 1975 she had additional income of approximately $2,600,000.00) one-half of which is tax free, and she can well afford to make the payments required by the agreement.

Thus, it is submitted that the agreement between the parties in the present case is binding and enforceable.

The Federal and the New Jersey State Constitution prohibit the adoption of any law impairing the obligation of a contract. *U.S.C.A.* Const., Art. 1, §10; *N.J.S.A.* Const. Art. 4, §7, ¶3; *Daniel v. Borough of Oakland,* 124 N.J. Super 69 (App. Div. 1973) and *Krosnowski v. Krosnowski,* 22 N.J. 376 (1956). These cases support the fundamental law of contracts that the legal rights and obligations arising therefrom shall be enforced as written. When parties enter into such an agreement (even if they are husband and wife) they are bound thereby.

The trial judge's application of the preferred suitor doctrine denied plaintiff his constitutionally guaranteed right of equal protection and was in effect sex discrimination without justification. The New Jersey Appellate Division and New Jersey Supreme Court opinion failed to consider this issue at all although it had been raised on appeal.

It is respectfully submitted that certiorari should be granted to review the very important constitutional questions presented by this issue. Simply stated, husbands and wives should be treated equally when a court is called upon to consider the enforceability of inter-spousal agreements. Any other approach (as here the special treatment of the wife as the preferred suitor) is violative of the constitution safeguards guaranteeing equal protection of law regardless of sex and an unconstitutional impairment of contractual obligations.

Point II

It was a taking of property without due process of law to divest of all his right, title and interest in any and all assets acquired by the parties or either of them during the marriage. It likewise was in error to divest plaintiff of the proceeds from the sale of an apartment which he owned individually prior to the marriage between the parties.

On this issue there are additional reasons for the granting of certiorari in the within case. The constitutionality of the New Jersey equitable distribution statute has never been determined by this court. An increasing number of states have adopted or are adopting "equitable distribution" statutes similar to New Jersey (e.g. Colorado and New York). In the within case the court has construed the authority bestowed upon it by the statute to give it the right to rule that plaintiff must convey all his right, title and interest in all assets acquired by the parties or either of them during the marriage including real property stocks and art objects worth several million dollars to defendant. The result obtained herein is unconstitutional insofar as it gives a trial court for all practical purposes absolute unlimited authority to require one party to forfeit and convey to the other any and all assets in which that party has an interest, regardless of whether acquired prior to or during the marriage, without consideration of the contribution of that party towards the acquisition of assets and without considering the right of a party to have his or her fair share of assets acquired during the marriage. The court's determination of the issue will have far-reaching effect as more states adopt property distribution statutes and the number of divorces continues to increase. The scope of the court's authority pursuant to

such statutes is a question of genuine public importance which has not but should be resolved by this court.

The rulings of the New Jersey courts conflict with the provisions of the statute which grant the authority as well as the case law concerning marital fault and its relationship to equitable distribution, alimony, and related matters.

Once the trial judge determined that enforceability of the separation agreement between the parties was to be denied, resolution of the financial aspects of the divorce remained for consideration. These included the issues of equitable distribution, alimony and counsel fees.

Defendant after having moved to have judgment for divorce entered on "no fault" grounds (a fact accomplished) was permitted to introduce evidence of alleged marital misconduct on the part of the plaintiff. It is submitted that it was improper to take this testimony. It inevitably precipitated the strong possibility that the trial judge would be prejudiced thereby creating the constitutional problems raised herein. In fact, there would be no other result.

The alimony and equitable distribution of *N.J.S.A.* 2A:34-23 provide as follows:

> "In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. *In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.*"
>
> • • •

> "In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." (Emphasis added).

Only in cases where the judgment for divorce is based on "fault" grounds may marital fault be a factor perhaps relevant to the proper amount of alimony to be awarded. It is clear from the emphasized language of the statute that marital fault or wrongdoing is *not* a factor to be considered in cases where the judgment of divorce is granted on the ground of eighteen months separation, which is exactly the situation in the case sub judice.

In *Greenberg v. Greenberg*, 126 N.J. Super. 96 (App. Div. 1973) the Appellate Division reversed the trial court's award of alimony to the wife, ruling that marital wrongs do not constitute a basis for awarding alimony or for punishing a marital wrongdoer (in that case, the husband). The court restated the long standing test for determining the proper amount of alimony (See *Turi v. Turi*, 34 N.J. Super. 313 (App. Div. 1952); and *DiTolvo v. DiTolvo*, 131 N.J. Super. 72 (App. Div. 1974) including the elements of needs, ability to pay, duration of the marriage, physical, social and economic position of the parties; however, the court excluded fault as a factor.

The express language of the governing statute (*N.J.S.A.* 2A:34-23) provides that the court may consider marital fault as a factor in determining the proper amount of alimony to be awarded only in actions ". . . other than those where judgment is granted solely on the ground of separation . . ." In the case *sub judice*, the parties elected to prove a cause of action for divorce on the ground of

separation (the defendant-wife, in fact, moved for summary judgment on this issue) and judgment was entered solely on this ground. Therefore; fault was not a proper factor relevant to the court's consideration of the alimony issue.

Never is fault a proper factor for consideration by the trial court when making an award for equitable distribution.

The concept of marital fault as it relates to dissolution of the marriage and its effect on equitable distribution was considered by N.J.'s highest court. In *Chalmers supra*, The New Jersey Supreme Court made the following ruling in that regard.

> "Should matrimonial fault be one of the criteria or circumstances that may properly be taken into account (in the equitable distribution of assets)? We conclude that the answer must be in the negative even though the statute speaks of "equitable distribution". Indeed, we are satisfied that the concept of "equitable distribution" required that fault be excluded as a consideration." *Id.* at page 193".

The decision of the trial court and of the Appellate Division in the within case is contrary to the New Jersey Supreme Court's rulings in *Painter, supra* and *Rothman, supra* which set forth the criteria that the court is to consider when making an award for equitable distribution, as well as the quoted ruling of *Chalmers, supra.*

Furthermore, since the conversation allegedly was learned of in April, 1976, subsequent to the date that the parties entered into their separation agreement at the time of their separation in February, 1976, this conduct is irrelevant on that issue according to the New Jersey Su-

preme Court's decision in *Brandenburg, supra* and *Smith v. Smith*, 72 N.J. 350 (1977).

The issue of marital fault, however, was not only considered by the court but was determined to be the single factor overriding all others notwithstanding the aforementioned statute and case law in this regard. It led to the extraordinary result from which plaintiff appealed.

Plaintiff has been directed to forfeit (and defendant has been rewarded with) all his interest in property worth several million dollars which property for the most part was jointly acquired by the parties during the marriage. Even more extraordinary however is the decision of the New Jersey Appellate Court which not only affirmed the trial court's ruling but went further to direct plaintiff to convey to defendant the proceeds from the sale of property which was solely owned by plaintiff having been acquired by him prior to the marriage.

It is respectfully submitted that the court's order taking *all* plaintiff's property from him and awarding it to defendant as a result of an alleged act of marital misconduct constitutes an unconstitutional taking of property without due process of law. Moreover if the statute is to be construed so as to give the courts this unlimited power then the constitutionality of the statute as a whole should be examined by this court with regards to the constitutional guarantee of due process of law and the vagueness of the statute itself which sets forth absolutely no guidelines for the court to follow when effecting this "equitable distribution" of property. This is a question of increasing significance as more and more states adopt property distribution statutes similar to New Jersey's and the number of divorces increase. Does the adoption of such a statute actually bestow upon a trial judge the unlimited authority to divest one party of any and all property acquired by him either along or with his spouse; whether prior to or

during the marriage, solely as a result of an alleged single act of marital misconduct?

Point III

It was an error and violative of 18 *U.S.C.A.* §2510 *et seq.* to permit the introduction into evidence of the purported tape of an alleged telephone conversation between plaintiff and a third party where no foundation had been established by competent direct evidence.

As stated, the determination of the within case actually turned on the question of the admissibility of the purported tape (or copy thereof) of the alleged telephone conversation(s) between plaintiff and a third person. Plaintiff denied ever engaging in the conversation. The third party who purportedly made the tape did not testify or provide any affidavits. His deposition was not taken although defendant's attorney had the right to do so. The individual who supposedy made the tape did not deliver it to the defendant rather it was allegedly delivered by another third person who also failed to come forward to testify as to how he had obtained the tape, what he had done with it, whether it had been altered at all or how he came to provide it to defendant. The tape was admitted based on defendant's hearsay statement that these third persons had told her about the tape and had given it to her although no explanation was offered as to why they never came forward to corroborate this claim.

18 *U.S.C.A.* §2511 provides that wiretap interception of telephone communications, the recording of telephone conversations, etc., are unlawful acts subject to penalties. Section 2515 of the same statute provides that no part of communication intercepted in violation of this chapter may

be received into evidence in any trial, hearing or other proceeding before any court or other tribunal of the United States, a State of political subdivision thereof. *N.J.S.A.* 2A:156 provides for the New Jersey adoption of similar standard. *In Progress Trace of a Wire Communication,* 138 N.J. Super. 404 (App. Div. 1975). Even though defendant provided no evidence surrounding the making of the purported tape, control of the tape, etc., the trial judge admitted the tape into evidence, notwithstanding the fact that there was no proper foundation laid with respect to the tape. *State v. Driver*, 36 N.J. 225 (1962); *Anno.* 58, A.L.R. 2d 1024 (1958); *State v. Driver, supra,* the New Jersey Supreme Court stated the conditions for admissibility of such a recording as follows:

> "As a condition to admissibility, however, the speakers should be identified and it should be shown that (1) the device was capable of taping the conversation or statement; (2) its operator was competent; (3) the recording is authentic and correct; (4) no changes, additions or deletions have been made. . . ."

Defendant's proofs are totally lacking in this regard; they do not even begin to establish the conditions for admissibility. (The trial judge "presumed" that these conditions were met only because of the existence of "a tape"). Defendant provided no evidence as to any of the circumstances surrounding the taking of the purported tape or the qualifications of the person who allegedly made the tape; nor is there any way to establish the authenticity of the tape in its present form. None of the principals allegedly involved in the making of the tape, of the copy of the tape, who claimed to have had custody and control of it or made delivery of the tapes to defendant have come before the court in any way. Defendant, however, relied

upon the claim that *they* initiated contact with defendant and volunteered the tape to her, although no explanation is offered for their failure to come forward with sworn testimony during the twelve days of trial which were spread over a period of approximately five months.

The admissibility of the tape violates the statutory and case law requirements regarding such recordings. It's admissibility was based on the self-serving hearsay statements of defendant. Plaintiff has been denied his constitutionally protected right to cross-examine the individuals (Theodore Fino) who allegedly made and/or had control of the tape and who delivered it to defendant.

Even if we assume arguendo that the conversation did take place, the copy of the purported tape would still not be admissible given the failure to meet the statutory requirements. *State v. Droutman*, 143 N.J. Super. 333 (Law 1976). The intrusion into private communication by means of a wiretap or tape recording is clearly illegal and not admissible into evidence where the express guidelines of the statute have not been met. *State v. Droutman, supra*, ruled:

> "The wiretap statute renders unlawful the interception of communications which are not in accord with procedures outlined in its provisions, *N.J.S.A.* 2A:156A-21. *N.J.S.A.* 2A:156-2(c) defines the term "intercept" as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device. "Contents" include "any information concerning the identity of the parties to such a communication or the existence, substance or meaning of that communication." *N.J.S.A.* 2A:156-2(g). A reading of the cited provisions clearly indicates that the statute applies to the use of any device or apparatus capable of detecting, among

other things, the identity of a party to a communication as a result of overhearing words or sounds."

The importance of specific compliance with the provisions of the wiretap statute was underscored in *In Progress Trace of a Wire Communication, Etc., supra,* where the court noted with respect to *N.J.S.A.* 2A:156-1:

> "The wiretap acts serve two basic purposes. First, they provide for the showing of probable cause, etc., necessary for compliance with the Fourth Amendment. *Above and beyond that; the acts place restrictions upon the use of wiretaps and the invasions of privacy that they entail.* Therefore, if the State, for good reason, wishes to follow the procedures and accept the limitations of the wiretap act, even though it might be able to satisfy the Fourth Amendment, otherwise, we see no reason why it should not be permitted to do so. Indeed, that procedure may be desirable." (Emphasis added).

There has been no showing why any restrictions of the act do not apply in the instant case. There has been no compliance with the provisions of the statute or case law respecting the circumstances under which the tape recording could be admitted. In fact, the admission in evidence of the purported tape recording was a violation of the very rights which the act is designed to safeguard. The seriousness of this error is magnified by the fact that it resulted in an order by which plaintiff was denied his right to "equitable distribution" of several million dollars worth of assets.

The evidence which was adduced at trial supports the conclusion that there is not sufficient justification for the result. The parties in this case agreed to submit to a poly-

graph examination in connection with the purported tape. The court suggested an independent polygraph examiner (Earl Kane) to conduct the examination. The examiner, however, was unable to reach a conclusion with respect to plaintiff's denial that he ever attempted to hire anyone to assassinate his wife and his denial that it was his voice on the tape. Plaintiff, however, produced another polygraph expert (Nate Laurendi) whose qualifications as such were not questioned. Mr. Laurendi testified in no uncertain terms that he was satisfied that plaintiff was truthful when he said it was *not* his voice on the tape and that he had *never* attempted to hire an assassin to murder his wife. There was no reason to question Mr. Laurendi's testimony and the trial judge did not specifically reject his testimony or conclusion.

Nowhere on the record can any attempt be made to establish the foundation necessary to introduce the tape into evidence. Absent any such showing it is submitted that the trial judge's allowance into evidence of the tape was violative of both the United States and New Jersey State Statutes in this regard. Admission into evidence of this tape led both the trial judge and the Appellate Division to decide that the plaintiff was "entitled to nothing" and as a result he has been ordered to deliver to defendant assets which were owned by plaintiff prior to the marriage herein. In addition, plaintiff was denied equitable distribution of assets worth several million dollars. Research has disclosed no cases which support such an extraordinary one-sided result. None of the factors enunciated by the Supreme Court in *Painter, supra, Rothman, supra,* and *Chalmers, supra* (1974) support such a conclusion. Nowhere can any justification be found for the award to one party of assets owned by another party prior to the marriage. In fact, such a concept has been repeatedly, specifically rejected by the Supreme Court of N.J., *Painter, supra.*

CONCLUSION

For all the reasons stated herein it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

/s/ Neil Braun
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